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No. 96-585

In The

Supreme Court of the United States

October Term, 1996

STEVEN F. ETHIER,

Petitioner,

vs.

KATHLEEN ANN LARSON
and STATE OF MINNESOTA,

Respondents.

On Petition For Writ Of
Certiorari To The
Minnesota Court Of Appeals

BRIEF IN OPPOSITION OF RESPONDENT STATE OF MINNESOTA

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QUESTION PRESENTED

Does a harassment restraining order issued under Minn. Stat. § 609.748 (1994) violate the First Amendment as applied because the conduct that is barred by the restraining order, and which satisfied the statutory requirements for its issuance, consists in part of the unwanted mailing of a magazine article to the harassment victim's home with the intent to adversely affect her privacy?

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BRIEF IN OPPOSITION

Respondent State of Minnesota respectfully requests that the Court deny the petition for writ of certiorari seeking review of the decision of the Minnesota Court of Appeals in this case, for which the Minnesota Supreme Court denied a petition for discretionary review. The opinion of the Minnesota Court of Appeals (Pet. App. A2-A6) is unreported but available at 1996 WL 146456.

JURISDICTION

The decision of the Minnesota Court of Appeals sought to be reviewed was filed on April 2, 1996. The Minnesota Supreme Court denied a petition for discretionary review by order dated May 21, 1996. This Court's jurisdiction to review the decision of the Minnesota Court of Appeals on a writ of certiorari rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

U.S. Const. amend. XIV, § 1 provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Minn. Stat. § 609.748 (1994), under which the challenged harassment restraining order was issued, is set out in full at Pet. App. A14-A18. The statute, in subdivision 1(a)(1), defines harassment in relevant part as:

> repeated, intrusive, or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target.

STATEMENT OF THE CASE

This case presents an as-applied First Amendment challenge by Petitioner Steven F. Ethier, attorney pro se, to the restriction imposed on him under the Minnesota harassment restraining order statute, Minn. Stat. § 609.748 (1994). The crux of Ethier's constitutional claim is that the application of section 609.748 in this case should be subjected to strict scrutiny as a content-based restriction because the conduct that is barred by the restraining order against him, and which satisfied the statutory grounds for issuing the order, consists in part of his unwanted mailing of a magazine article on the pitfalls

of cohabitation before marriage to the home of the harassment victim, Respondent Kathleen Ann Larson, which was done with the intent to adversely affect her privacy. The Minnesota Court of Appeals held that the challenged harassment restraining order is content neutral and, as such, is a constitutionally permissible time, place, and manner restriction. Pet. App. A4-A6. The court concluded that Ethier's position amounted to the assertion of a nonexistent First Amendment right "to target an individual and intrude on her privacy with his opinions and propaganda." *Id.* at A4.

On March 7, 1995, Larson filed a petition in Hennepin County District Court in Minnesota under section 609.748 for a harassment restraining order against Ethier. That same day the district court issued to Ethier an Order for Harassment Hearing and Ex Parte Temporary Restraining Order. Upon agreement of the parties, a referee of the court continued the harassment hearing from March 21, 1995 to May 23, 1995, with the temporary restraining order to remain in force in the meantime.

Ethier then filed and served a notice, pursuant to Minn. R. Civ. P. 24.04, of his intent to draw into question the constitutionality of section 609.748 on its face or as applied under the First Amendment and the parallel free speech provision of the Minnesota Constitution. At the hearing on May 23, 1995, the district court continued the case to permit the State of Minnesota by its Attorney General to intervene to defend the constitutionality of the statute, keeping the temporary restraining order in force during the interim. In so doing, the court took specific note of the fact that Larson was proceeding pro se while Ethier is himself a licensed attorney.

At the full hearing that followed on June 22, 1995, the district court granted the unopposed motion of the State to intervene pursuant to Minn. R. Civ. P. 24.04, heard argument on Ethier's constitutional challenge to section 609.748, and took evidence on Larson's allegations of harassment. Larson's petition for a restraining order, made under oath, stated that she and Ethier were drivers for the same cab company and alleged that he had been harassing her for over a year. Larson alleged, and there was supporting testimony at the hearing, that Ethier harassed her by: (1) entering her home uninvited and unannounced and then staring at her; (2) watching her arrive home late at night from his cab parked outside her house; (3) coming uninvited to the funeral of her mother and leaving an inappropriately familiar sympathy card for Larson with the funeral director; (4) afterwards frequenting the same two churches that Larson attended but which Ethier did not previously attend; (5) threatening to one day flatten her car tires and those of her male roommate; (6) telling one of their co-workers that he wanted Larson's male roommate to move out of her home;[1] and (7) anonymously mailing a magazine article on the pitfalls of cohabitation before marriage to Larson's home and, four days later, to her father. At the hearing, Ethier admitted mailing the article and further testified that he was opposed to sex outside marriage.

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[1] The co-worker testified that Ethier had said this was because he wanted Larson for himself and did not trust her roommate, and that Ethier had also said he would do everything in his power to make sure Larson's roommate moved out.

On June 27, 1995, the district court issued a two-year harassment restraining order against Ethier, finding that Ethier had engaged in behavior constituting harassment under section 609.748 and that the statute is constitutional both on its face and as applied in this case. Ethier has not challenged the district court's finding that he engaged in behavior constituting harassment, which is defined by the statute in pertinent part as "repeated, intrusive, or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target." Minn. Stat. § 609.748, subd. 1(a)(1) (1994). Under the terms of the restraining order, Ethier is prohibited from contacting Larson by any means and must avoid harassment of her and her family. Pet. App. A7-A10. These terms mirror those set forth in Minn. Stat. § 609.748, subd. 5(a) (1994). The order also directs Ethier not to park his vehicle in front of or within sight of Larson's home. Pet. App. A10.

Ethier appealed this order to the Minnesota Court of Appeals. On appeal, the facts of Ethier's harassment of Larson were undisputed, including that his anonymous mailing was unwanted by her and intended by him to adversely affect her privacy. Pet. App. A2-A4. Nor did Ethier pursue an overbreadth or other facial challenge to section 609.748. He argued only that the statute as applied in this case violates the First Amendment under the strict scrutiny standard. The premise of this argument was that the application of the statute to behavior by him that includes his unwanted mailing of the magazine article to Larson's home constitutes a content-based restriction on his freedom of speech. Pet. App. A4.

In its opinion filed April 2, 1996 affirming the trial court, the Minnesota Court of Appeals rejected this premise and, with it, use of the strict scrutiny standard. The court of appeals concluded that the challenged harassment restraining order is content neutral and that Ethier has no constitutional right to force speech into the home of an unwilling listener. Pet. App. A4-A6. Based on these conclusions, the court used instead the First Amendment standard for a permissible time, place, and manner restriction and held that the application of section 609.748 in this case satisfies all the requirements of that standard. Pet. App. A4-A6.

Ethier petitioned the Minnesota Supreme Court for discretionary review and, as in the court of appeals, argued only that strict scrutiny should apply. The Minnesota Supreme Court denied the petition by order dated May 21, 1996.

Ethier mailed to this Court a petition for writ of certiorari and appendix on August 19, 1996. By letter dated August 23, 1996, the Clerk of Court directed Ethier to redo the petition and appendix to correct errors in its form. Ethier then filed the instant petition and appendix, in which he has asserted purported facts and grounds for reversal not presented to the courts below and not included in his original petition and appendix to this Court.

REASONS FOR DENYING THE PETITION

There is absolutely no sound reason for the Court to grant review in this case, much less the requisite "compelling reasons." Sup. Ct. R. 10. The decision of the Minnesota Court of Appeals is fully consistent with this Court's relevant First Amendment precedents, which have not applied strict scrutiny to content-neutral restrictions on expressive activities and which have refused to recognize a First Amendment right to force speech into an unwilling listener's home. Further, Ethier's petition improperly relies on alleged facts that are not part of the record in this case and also improperly asserts purported grounds for review which were not argued below or in his original petition to this Court.

I. THE MINNESOTA COURT OF APPEALS' DECISION CORRECTLY DECLINED TO APPLY FIRST AMENDMENT STRICT SCRUTINY IN THIS CASE BECAUSE THE HARASSMENT RESTRAINING ORDER IMPOSED AGAINST PETITIONER UNDER MINN. STAT. § 609.748 (1994) IS CONTENT NEUTRAL IN BOTH ITS TERMS AND THE GROUNDS FOR ITS ISSUANCE.

The only relevant legal argument discernible from the petition is that Minn. Stat. § 609.748 (1994) as applied in this case is unconstitutional under First Amendment strict scrutiny.[2] The sole basis identified for applying

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[2] The First Amendment applies to the states under the Due Process Clause of the Fourteenth Amendment. 44 *Liquormart, Inc. v. Rhode Island*, ___ U.S. ___, ___, 116 S. Ct. 1495, 1501 n.1 (1996).

such scrutiny here is that the restriction imposed on Ethier under the statute is content based because his harassing conduct includes the unwanted mailing to Larson's home of a magazine article on the pitfalls of cohabitation before marriage. Ethier contends in essence, as he did below, that the harassment restraining order violates his First Amendment rights because the cohabitation article does not fit within any of the narrow categories of proscribable speech, such as obscenity or fighting words, and therefore a restriction on his dissemination of the article is valid only if necessary to achieve a compelling state interest. Pet. at 8, 17; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992) (reiterating that content-based restrictions must satisfy this strict scrutiny standard).

The Minnesota Court of Appeals correctly rejected this argument as contrary to controlling First Amendment precedent. Under that precedent, it is clear that the challenged harassment restraining order is content neutral in both its terms and the grounds for its issuance, and thus is not subject to strict scrutiny.

In determining whether a restriction on expressive activity is content neutral, "[t]he government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The purposes served by the application of section 609.748 in this case are the protection of residential privacy and the protection of citizens from acts of intentional harassment. Pet. App. A5. These purposes are plainly unrelated to the content of any expression made by Ethier through his act

of anonymously mailing the cohabitation article to Larson's home.

Moreover, the challenged restraining order serves its protective purposes by prohibiting Ethier from any communication with the harassment victim, not just communication regarding his beliefs on cohabitation or sex outside marriage. The order is therefore clearly content neutral in its terms. As the Minnesota Court of Appeals stated, the order "contains no mention regarding the content of prohibited communication." Pet. App. A5.

The result is no different to the extent Ethier suggests that the restraining order is content based because his anonymous mailing of the cohabitation article was part of the conduct satisfying the statutory grounds for issuing the order. Such a suggestion ignores the undisputed fact that the mailing constituted "harassment" as defined in the statute only because it was unwanted and intended by Ethier to adversely affect Larson's privacy. Minn. Stat. § 609.748, subd. 1(a)(1) (1994). Thus, the statute made this part of Ethier's conduct "harassment" without regard to the viewpoint or subject matter of the article. His act of mailing the article would have constituted harassment under the statute regardless of whether that act had expressed some other viewpoint, concerned some other subject matter, or communicated no message at all. It is clear, then, that the statutory basis for the restraining order in this case is content neutral with respect to both viewpoint and subject matter. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992) (reiterating that to be content neutral, a restriction cannot apply either to only a particular viewpoint or to only a particular topic of speech). Because, like all his other unwanted conduct upon which the

restraining order is based, Ethier's mailing of the cohabitation article was done with the intent to adversely affect Larson's privacy, it would have been harassment under the statute whether the article had dealt with politics, sports, food or any other topic.

In short, the governmental purposes served by the restraining order in this case were triggered by the intent to harass, irrespective of what, if any, moral, religious or other underlying message any of the acts of harassment were meant to convey. Because the statutory grounds for the order are in this way " '*justified* without reference to the content' " of any speech by Ethier, they are as content neutral as the terms of the order itself. *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (emphasis added in *Ward*).

Since the harassment restraining order issued against Ethier under section 609.748 in this case is content neutral, the order is a constitutionally permissible time, place, and manner restriction if it is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication of the information. *Ward*, 491 U.S. at 791. Ethier does not dispute that the Minnesota Court of Appeals correctly held that all the requirements of this more lenient First Amendment standard are satisfied here. Indeed, this Court has stressed that " '[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.' " *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)).

In sum, the petition identifies no basis for this Court's review of the decision of the Minnesota Court of Appeals. The decision is fully consistent with well-established First Amendment law in its refusal to apply strict scrutiny to a content-neutral restriction on expressive activity. Contrary to Ethier's view, "[t]here simply is no right to force speech into the home of an unwilling listener." *Frisby*, 487 U.S. at 485. There is no reason for the Court to revisit this principle, and thus no basis under the First Amendment for exempting this part of Ethier's harassing conduct from application of section 609.748.

II. THE PETITION RELIES ON ALLEGED FACTS NOT IN THE RECORD AND ASSERTS PURPORTED GROUNDS FOR REVIEW NOT ARGUED BELOW OR INCLUDED IN THE ORIGINAL PETITION.

The purported facts set out in the fourth, sixth and seventh paragraphs of the petition's statement of facts, Pet. at 1, are not part of the record in this case. By these additional "facts," Ethier asserts that Larson's male roommate received social security disability benefits while employed, was fired from his job, left threatening messages on Ethier's answering service, and that a 300-pound reputed enforcer for the Hell's Angels personally threatened Ethier. *Id.* Because they are outside the record, these "facts" cannot be used to support the petition.

In any event, these "facts" are completely irrelevant to the constitutional issue in this case. The only point to which they may possibly relate is Ethier's apparent argument that the harassment restraining order is somehow

infirm because, by his current account, Larson sought it at the request of her male roommate, whom Ethier believes is abusive. *Id.* at 3-4. Such an argument has nothing at all to do with whether the Minnesota Court of Appeals erred by not applying strict scrutiny. Additionally, no such argument for reversal was presented to the courts below and therefore cannot be made here.

The petition is improper for the further reason that it went well beyond correcting the errors of form noted in the Clerk of Court's letter regarding the original petition. The instant petition has added "facts" and appendix material, altered the phrasing of arguments, and asserted new purported grounds for review. Section III of the petition, a disjointed and irrelevant discourse on domestic abuse, was not included in the original petition and thus amounts to an impermissible attempt to assert pre-existing grounds for review beyond the 90-day deadline for petitioning this Court. *See* Sup. Ct. R. 13, 14.5, 15.8.

Any latitude the Court might otherwise give to pro se litigants on such matters is inappropriate here given that Ethier is himself a licensed attorney. These improper aspects of the petition only underscore the lack of legal merit in his constitutional challenge.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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